IN THE

Supreme Court of the United States

VICTOR SALAS, PETITIONER

v.

U.S. DEPARTMENT OF HOMELAND SECURITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL P. BARANIC
Counsel of Record
Gattey and Baranic
A Professional Law Corporation
2445 Fifth Avenue, Suite 350
San Diego, CA 92101-1677
(619) 232-8142

Attorneys for Petitioner

FEBRUARY 2, 2009

QUESTION PRESENTED

Whether, in an arbitration proceeding under Merit Systems Protection Board rules, the agency must submit proof of the chain of custody of a random drug test sample when the employee alleges an irregularity or denies drug use?

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

Page

TABLE OF CONTENTS - Continued

Page

TABLE OF CONTENTS - Continued

Page

TABLE OF CONTENTS - Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES - Continued

CONSTITUTION & STATUES

TABLE OF AUTHORITIES - Continued

Page

MISCELLANEOUS

---

[1] Although the Immigration and Naturalization Service no longer exists, this contract applies to Border Patrol Agents employed by the Department of Homeland Security, Customs and Border Protection.

OPINIONS BELOW

On or about September 7, 2006, the Department of Homeland Security ("Agency") proposed to remove Victor Salas, Jr. ("Salas" or "Petitioner") from his position as a Border Patrol Agent based on the single charge of "Testing Positive for Controlled Substance in a Random Drug Test". (JA 23-25)[1].

Salas presented an oral reply to the charges on October 19, 2006. (JA 26-50).

On or about November 7, 2006, Salas was served with a Decision Letter upholding the proposal to terminate his employment as a Border Patrol Agent with the United States Border Patrol. (JA 51-53).

Salas was terminated effective November 7, 2006. (JA 52).

An arbitration hearing was held on June 20, 2007, in El Centro, California, before Arbitrator Harry N. MacLean. (JA 1).

The Arbitrator issued his award and decision on August 8, 2007. (JA 1-21). The award upheld the Agency's action.

Salas filed an appeal to the U.S. Court of Appeals for the Federal Circuit on October 3, 2007.

---

[1] "JA" refers to the Joint Appendix to the Briefs submitted by the Appellant on behalf of both of the parties to the Court of Appeal. References to page numbers are to the consecutive page numbers located in the center of the bottom margin of each page of the Joint Appendix.

The Court of Appeals had exclusive appellate jurisdiction to review an arbitrator's award under 5 U.S.C. §§ 7121(f), 7703(a)(1) and (b)(1).

The Court of Appeals decided *Salas v. Department of Homeland Security,* 2008-3007, on October 8, 2008. A final judgment was entered on that date. The Court affirmed the arbitrator's award.

Salas' petition for a Panel Rehearing was denied on November 4, 2008.

JURISDICTION

The final judgment of the Court of Appeals for the Federal Circuit was entered on October 8, 2008.

Petitioner's petition for Panel Rehearing was denied on November 4, 2008. On February 2, 2009, this petition was filed within the applicable time limit.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in part: "No person shall be deprived of life, liberty, or property, without due process of law...". U.S. Const. Amend. V

STATEMENT OF THE CASE

Petitioner Victor Salas, Jr. was a Border Patrol Agent employed by the Department of Homeland Security, Bureau of Customs and Border Protection, United States Border Patrol, El Centro (California) Sector and, at the time of his removal, was assigned to the Indio Border Patrol Station. (JA 51).

Salas began his employment as a Border Patrol Agent on January 27, 2002. (JA 52). In May 2005, after just three short years of being a Border Patrol Agent, Salas became a canine handler. (JA 187). He and his canine partner were responsible for many narcotics seizures, including a multi-kilo cocaine and methamphetamine seizure on July 25, 2006.

On August 1, 2006, Salas was notified that he and a number of other agents were selected for random drug tests. (JA 122-124). After being notified about the test, Salas and the other agents proceeded to the building next door, formed a line and waited for their turn to meet with the contractor tasked with obtaining the samples. (JA 218-219). When it was Salas' turn, he handed his sample to the contractor, the contractor turned his back and walked through the door into the hallway. (JA 219). Salas proceeded to wash his hands in the restroom and then joined the contractor in the hallway where he was handed a strip to initial that was ultimately placed on the cap and body of a container. (JA 219). At the time of the test, Salas did not know that he was supposed to keep his specimen in sight until it was finally sealed. (JA 219).

On or about August 7, 2006, Salas received a call, at his home, from the Agency's contracted Medical

Review Officer regarding his possible positive drug test. (JA 102, 220). Immediately after that phone call, Salas dressed, contacted his friend/union steward and went to the station to meet with his managers to advise them of his contact from the Medical Review Officer.

On or about September 7, 2006, the Agency proposed to remove Salas from his position based on the single charge of "Testing Positive for Controlled Substance in a Random Drug Test". (JA 23-25).

Salas presented an oral reply to the charges on October 19, 2006. (JA 26-50). During his oral reply, Salas denied using cocaine and pointed out the break in the chain of custody to both of the Assistant Chief Patrol Agents he met with. (JA 29, 31).

On or about November 7, 2006, Salas was served with a Decision Letter upholding the proposal to terminate his employment as a Border Patrol Agent with the United States Border Patrol. (JA 51-53). Salas was terminated effective November 7, 2006. (JA 52). A grievance of the removal was timely filed in accordance with the collective bargaining agreement between the Immigration and Naturalization Service and the National Border Patrol Council. The arbitration hearing was held on June 20, 2007, in El Centro, California, before Arbitrator Harry N. MacLean. (JA 1).

The Agency called three witnesses: 1) its Medical Review Officer ("MRO") who is responsible for reviewing and interpreting drug test results; 2) one of Salas' supervisors; and 3) its Deciding Official. (JA 57). Inexplicably, the Agency failed to call the

contractor who collected the samples from the many employees, including Salas, who were tested on August 1, 2006, and it offered absolutely no explanation for its failure to call this key witness, particularly after Salas had advised the Agency during his oral reply of the contractor's failure to follow the proper collection procedure and of the break in the chain of custody regarding the sample Salas provided.

The matter was submitted for decision pending the filing of post-hearing briefs by the parties. On August 8, 2007, the Arbitrator sustained Salas' removal. (JA 1-21).

Salas filed a Petition for Review on October 3, 2007 with the Court of Appeals for the Federal Circuit. The Court of Appeals had exclusive jurisdiction under 5 U.S.C. §§ 7121(f), 7703(a)(1) and (b)(1).

The Court decided *Salas v. Department of Homeland Security,* 2008-3007, on October 8, 2008. A final judgment was entered on that date. The Court affirmed the arbitrator's award.

Salas' petition for a Panel Rehearing was denied on November 4, 2008.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Under *Rule 10(a)* of this Court, certiorari may be granted if a United States Court of Appeals has sanctioned the departure from the accepted and usual course of judicial proceedings by a lower court so as to call for an exercise of this Court's

supervisory power. The integrity of the entire legal system depends on application of sound principles of law at every level, insuring that the Constitutional rights of the accused are safeguarded. For this reason, it is important that legal precedent is followed in arbitration hearings when so required.

In the case at hand, a random drug testing case in which a Border Patrol Agent's employment was terminated, the petitioner chose arbitration rather than an appeal to MSPB. Therefore, the arbitrator was bound to follow Merit Systems Protection Board ("MSPB") law. "(T)he arbitrator is bound by the same procedural and substantive law as the MSPB", *Cornelius v. Nutt*, 472 U.S. 648, 660 (1985). The agency, either intentionally or by omission, did not present proof of the chain of custody at the hearing. Under applicable MSPB precedent, the agency was required to prove the chain of custody for Petitioner's sample. See *Boykin v. U.S. Postal Service,* 51 M.S.P.R. 56 (1991).

In granting his award upholding the agency's decision to terminate Petitioner's employment, the arbitrator clearly ignored both the law and applicable precedent.

When the Petitioner appealed to the Court of Appeals for the Federal Circuit, the court characterized the issue under consideration as the sufficiency of the chain of custody rather than the requirement that the agency prove the chain of custody, and affirmed the arbitrator's decision, thereby sanctioning it.

This is an important case, because thousands of Federal employees are covered by the arbitration process. It is particularly pertinent to Federal law enforcement personnel, because virtually all Federal law enforcement officers are subject to random drug testing. The Fifth Amendment[2] property rights of all of these employees will be at risk, as will be the government's well-established interest in insuring that law enforcement officers are drug-free, unless the Court provides clarity. See *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989).

For these reasons, Petitioner respectfully requests that the Court grant certiorari in this case, and affirm the MSPB's bright-line rule requiring that the agency submit proof of the chain of custody of the sample under consideration whenever the employee denies drug use.

ARGUMENT FOR CERTIORARI

A. Applicable Law

In the Petitioner's case, the arbitrator was bound to apply MSPB law. Under the agreement between the Immigration and Naturalization Service and the National Border Patrol Council an employee may choose arbitration and,(as the agency recognized in its post-hearing arbitration brief,) "[t]he Supreme Court has held that, where an employee chooses to file a grievance [of an adverse action] rather than appeal

---

[2] "No person shall be ... deprived of life, liberty, or property, without due process of law..." U.S. Const. Amend. V

to the MSPB, and arbitration is invoked, the arbitrator is bound by the same procedural and substantive law as the MSPB" *citing Cornelius v. Nutt*, 472 U.S. 648, 660 (1985) *and* 5 U.S.C. § 7121(c)(2). (JA 340)[3].

1. Under MSPB law, a published decision is binding precedent.

In *Robinson v. HHS*, 32 M.S.P.R. 683, 685 (MSPB 1987), the board stated the principle that "the Board would apply its precedent in reviewing arbitration decisions."

2. In order to protect an employee's significant property right in continued federal employment, the Merit Systems Protection Board has developed precedent mandating that, if an employee tests positive for illegal drug use in a random test and the employee denies drug use, the agency must prove the validity of the test.

This precedent can be summarized as follows:

---

[3] 5 U.S.C. § 7701(f) states, in part: "judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board." 5 U.S.C. § 7121(c) states "(1)...the decision of the agency shall be sustained under subsection (b) only if the agency's decision— ...(A)..is supported by substantial evidence..." The Supreme Court has defined the "substantial evidence" standard as: "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197 (1938).

"To sustain this charge, the agency must prove that the test on which it relied to remove the appellant was valid. See *Moen v. Department of Transportation,* 28 M.S.P.R. 556, 558 (1985). If the agency proves that the chain of custody was properly maintained and that the laboratory procedures were accurate, the charge must be sustained. See *Storm v. Department of the Army,* 64 M.S.P.R. 14, 21 (1994)." *Rowe v. Dep't of the Air Force,* 2008 MSPB LEXIS 2207 (MSPB 2008).

3. The definition of the chain of custody can be obtained in *Rowe v. Dep't of the Air Force,* 2008 MSPB LEXIS 2207,(MSPB 2008).

Both the definition and the proof required are summarized below:

> Chain of custody ... is defined as the requirement that, "the one who offers real evidence, such as the narcotics in a trial of drug case, must account for the custody of the evidence from the moment in which it reaches his custody until the moment in which it is offered in evidence, and such evidence goes to weight not to admissibility of evidence." Black's Law Dictionary 208 (5th ed. 1979). And, in this context, custody is defined as, "keeping; guardianship; care." Random House Webster's College Dictionary 335 (1st ed. 1991).

> Therefore, in this case, to prove a proper and verifiable chain of custody, the agency must show that the urine sample was properly identified and guarded between the taking of the sample and the performance of the tests.

Id. at 3-4

Notably, the definition does not apply to the validity of the actual tests performed on the specimen, but to the process employed to ensure that the specimen that is tested is the one that was submitted in any particular case.

4. The chain of custody is a critical element in a drug test case.

As noted in *Frank v. Dept. of Transportation,* 35 F.3d 1554 (Fed. Cir. 1994):

> [b]y no means do we wish to trivialize the importance of the chain of custody over specimens, as well as the procedures necessary to ensure the chain is not broken. We are not prepared to say, however, that a violation of procedures automatically and fatally undermines the chain of custody. Each case must be strong enough so that, on the record as a whole, the decision of the arbitrator can be found to be

> supported by substantial evidence.

Id. at 1557.

Thus, the only way to determine if the chain of custody has been undermined or not is to submit proof of the chain of custody itself. This is the threshold element the Agency failed to establish.

5. The courts have described the process necessary for proving the charge in a drug test case in *Frank* and in *Dixon v. Dept. of Transportation,* 8 F.3d 798 (Fed. Cir. 1993.)

There are two discrete issues involved in drug testing cases such as the instant matter: 1) the agency must establish the chain of custody, and 2) the trier of fact must determine whether a purported break in the chain of custody calls into question the results of the sample.

6. The applicable precedent decision in this case is *Boykin v. United States Postal Service*, 51 M.S.P.R. 56 (1991).

Under *Boykin*, if an agency seeks to remove an employee based on a positive drug test, the agency bears the burden of proving by a preponderance of the evidence that the test on which it relied to remove the appellant was valid. *See* 5 C.F.R. § 1201.56(a)(ii).

To prove the validity of a drug test, the agency must prove two things, first, that the sample tested originated with the employee, and second, that the

sample tested positive for illegal drugs. See: *Naekel v. Dept. of Transportation*, 782 F.2d 975 (Fed.Cir. 1986); *Burroughs v. Dept. of the Army*, 918 F.2d 170, 172 (Fed.Cir. 1990).

7. *Boykin* mandates that when the employee denies drug use, the agency must prove the chain of custody.

Like the Petitioner, Boykin steadfastly denied using cocaine. *Boykin* specifically identifies the "trigger" that requires that the agency prove the chain of custody as the Petitioner's denial of drug use. "If an appellant denies using drugs when charged with a positive drug test, the agency must prove ... that the chain of custody was valid." *Hanley v. Dept. of Veterans Affairs*, 2005 MSPB LEXIS 3319 (2005), *citing Boykin v. U.S. Postal Service*, 51 M.S.P.R. 56, 58 (1991).

Thus, the agency was required to prove the chain of custody. The agency in *Boykin* failed do so because it did not present the testimony of the collector "or anyone else with knowledge of the chain of custody of the sample". *Boykin* at 58. Therefore, the Board ruled that the agency's charge could not be sustained.

The Petitioner's case is much the same. The chain of custody is usually documented on a standard form, which the agency did not submit for the record. Nor did the agency attempt to prove the chain of custody by producing the specimen collector and/or the examining technician, either in person or telephonically, a chore that would have placed only a minimal burden on the agency (JA 386).

The evidence presented regarding Petitioner's sample consisted of testimony that Petitioner submitted his urine sample between 4:05 and 4:20 P.M. and that, in conjunction with providing the sample to the collector, he signed and initialed various documents. (JA 123-124; 219). None of those documents were presented in evidence.

The Agency also presented a document entitled "Test Results Report", indicating that a sample, which included the notation that it was collected at 12:00 AM, more than sixteen (16) hours prior to the sample Petitioner provided, tested positive for cocaine metabolites. (JA 386).

In the Petitioner's case, although the agency presented evidence that a sample tested positive for cocaine, no evidence, testimonial or documentary, was presented that would tend to prove the chain of custody of the sample attributed to the Petitioner, specifically that the sample that was tested was that of the Petitioner.

8. Because the threshold issue, the proof of the chain of custody, was not documented, the arbitrator could not reach the second *Frank* issue, whether any defects in the chain call into question the results of the sample.

Only if the chain of custody had first been established could the arbitrator have made a determination of whether or not the evidence was substantially proven to be what it purported to be, and what weight should be given to it.

9. Therefore, the agency could not prove that the sample originated with the petitioner.

Since the Petitioner's removal was based on only a single charge predicated upon his testing positive for illegal drugs, and the Agency failed to submit evidence to prove the chain of custody of the sample, the Agency did not meet its burden of proof. It cannot be proven that the Petitioner was the source of the sample or that the sample was substantially the same when it was tested as when it was collected.

Only if the chain of custody had first been established could the arbitrator have made a determination of whether or not the evidence was substantially proven to be what it purported to be, and what weight should be given to it. Since the chain of custody was never proven, the arbitrator could not consider the evidence of the positive drug test of the sample allegedly provided by the Petitioner.

10. Hence, according to the precedent of the *Boykin* decision, the arbitrator should have ruled against the agency.

Without the evidence of the positive drug test, there was no basis for sustaining the Agency's decision to terminate the Petitioner's employment.

11. The arbitrator's failure to apply Merit Systems Protection Board precedent and require proof of the chain of custody is a departure from the usual course of judicial proceedings.

Under the Fifth Amendment a permanent government employee is entitled to due process, that is, notice and a fair hearing, whenever a federal agency seeks to terminate his or her employment. Because the arbitrator did not require the government agency to prove the elements of the single charge for which the Petitioner's employment was terminated in accordance with MSPB law, specifically to submit proof of the chain of custody of the urine sample in evidence, the arbitrator denied the Petitioner due process and thereby departed from the usual course of judicial proceedings.

B. In the petitioner's appeal to the Court of Appeals for the Federal Circuit, the court mischaracterized the issue under consideration.

The court affirmed the arbitrator's decision, thereby sanctioning it, because the arbitrator's award (and the Court of Appeals' decision) mistakenly presumed that a proper chain of custody already existed and that the Agency was not required to prove it. Although the court noted[4] that the agency had not submitted any testimony regarding of the

---

[4] *Salas v. Dep't of Homeland Sec.*, 2008 U.S. App. LEXIS 21722 (Fed.Cir. Oct. 8, 2008), 2.

chain of custody, it found that the chain of custody was sufficient[5].

1. **On appeal, the court incorrectly stated that the petitioner had not raised the chain of custody issue in the proceeding below[6].**

The inaccuracy of this assumption can be readily proven by the evidence in the record. Petitioner raised the issue at his oral reply (JA 4,6), at the arbitration hearing (JA 219) and in his post arbitration brief (JA 372). Alternately, the Petitioner's denial of drug use itself triggered the agency's obligation to prove the chain of custody in the proceeding below.

2. **In the respondent's brief to the appeals court, the respondent stated that there were "no indications of a break in the chain of custody" (Resp. Brief,[7] p. 6,) that would require the agency to prove the chain of custody. This implies that the agency believed that it need only prove the chain of custody if the employee challenged them to do so in front of the arbitrator. (Resp. Brief, p. 11.)**

This was not the case. As shown above, under *Boykin,* the Agency was required to prove the chain of custody as soon as the Petitioner denied drug use.

---

[5] *Id.* at 4.

[6] *Id.* at 4.

[7] Respondent's Brief to the U.S.C.A.F.C., Appeal No. 2008-3007, June 9, 2008

In fact, this is an admission that the agency did not prove an element of the charge. Nevertheless, the court determined that the chain of custody was substantially sufficient despite the Agency's failure to submit proof of the chain of custody into evidence.

3. The court's decision seems to shift the burden of proof to the petitioner.

The court remarked that the petitioner did not produce any evidence at the arbitration hearing that the sample was not his beyond the allegation that the sample briefly left his sight[8]. This is not the issue. The fact that the Petitioner denied taking drugs alone is enough to trigger the Agency's obligation to prove the chain of custody under *Boykin*.

4. The court improperly sustained the arbitrator's award as based on substantial evidence, the standard of review.

Contrary to the Agency's apparent belief, the Petitioner was under no obligation to tell the Agency what it was required to prove. It is the Agency's responsibility to recognize and prove the elements of a charge. If the Agency does not prove the elements, then the charge cannot be sustained. A person on trial for murder need not remind the prosecutor to enter the alleged murder weapon into evidence.

Here, the agency could not simply refute or minimize these facts, it had to prove the entire chain

---

[8] *Salas*, 2008 U.S. App. LEXIS 21722 at 2.

of custody, because under *Boykin*, these factors triggered the agency's obligation to do so.

Had this been done, the defects in the chain of custody would impact the weight of the evidence of a positive test. Because the agency did not do so, the evidence of the positive test, that is, the proof of the second element of the charge, that the specimen was positive for illegal drugs, should not have been considered at all. Therefore, because there is no proof in the record that the sample originated from the employee and was the same sample that was in fact tested, there is no credible evidence, hence no substantial evidence, to support either the arbitrator's decision or the court's affirmation.

5. The court also implied that because the petitioner's attorney referred to the sample that tested positive as Salas' sample[9] while arguing the industrial contamination theory that he "admitted" that the sample had originated with the employee.

This is inaccurate as well. The fact that the employee offered a credible alternate explanation for a positive result, if in fact the sample did originate with him, does not mean that the employee conceded that the sample that was tested was in fact his. Even if this were true, however, it would be of no consequence since under *Boykin* the agency would still have had to prove the chain of custody in order for the evidence of the positive drug test to be used

---

[9] *Id.* at 4.

against the appellant because the employee maintained that he did not use illegal drugs.

6. The Court of Appeals decision affirms a clear violation of the petitioner's rights to substantive due process under the 5th Amendment.

Here, a government actor, the Agency, proposed to terminate Petitioner's employment, where continued employment in civil service is a recognized property right of a permanent employee. The Petitioner was not provided with a safeguard guaranteed by the Constitution, that is, a fair hearing, because the agency was not required to prove every element of the charge on which the termination of his employment was based by substantial evidence.

CONCLUSION

The arbitrator erred by not following valid, binding precedent requiring the agency to prove the first element of the charge, the chain of custody, hence there was no substantial evidence that the sample originated with the petitioner and was in substantially the same condition in which it was tendered when it was tested. The Court of Appeals affirmed his decision, basing its decision, at least partially, on the incorrect assumption that the issue under consideration had not been raised in the proceeding below, and, impliedly, on the premise that the agency was not required to offer proof of the chain of custody of the sample. The Court did not recognize that by failing to follow MSPB law, the arbitrator not only erred, but effected a departure

from the accepted and usual course of judicial proceedings.

In affirming the arbitrator's award, the court's decision sanctioned such a departure by a lower court.

For this reason, the petitioner requests that this Court exercise its supervisory power to correct this injustice, and to insure the rights of thousands of government employees.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Michael P. Baranic
Gattey and Baranic
A Professional Law Corporation
2445 Fifth Avenue, Suite 350
San Diego, CA 92101
(619) 232-8142

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-3007

VICTOR SALAS, JR.,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Petition for review of an arbitrator's decision by Harry N. MacLean.

ORDER

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Bryson, Circuit Judge, Gajarsa, Circuit Judge, and Dyk, Circuit Judge.
A petition for rehearing having been filed by the Petitioner,

UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on December 1, 2008, unless another time becomes appropriate under Rule 41.

Jan Horbaly
Clerk

FOR THE COURT,
Dated: 11/04/2008

Michael P. Baranic
J. Reid Prouty

SALAS V DHS, 2008-3007
(MSPB -)

NOV 4 - 2008
JAN HORBALY
CLERK

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3007

VICTOR SALAS, JR.,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Michael P. Baranic, Gattey Baranic LLP, of San Diego, California, for petitioner.

J. Reid Prouty, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With him on the brief were Gregory G. Katsas, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Martin F. Hockey, Jr., Assistant Director. Of counsel were Marla T. Conneely and David M. Hibey, Trial Attorneys.

Appealed from: Arbitrator's Decision

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3007

VICTOR SALAS, JR.,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Petition for review of an arbitrator's decision by Harry N. MacLean.

DECIDED: October 8, 2008

Before BRYSON, GAJARSA, and DYK, Circuit Judges.

PER CURIAM.

Petitioner Victor Salas, Jr., ("Salas") petitions for review of an arbitrator's award. The award denied his grievance. He claims that he was improperly removed from his position with U.S. Customs and Border Protection ("agency"), an agency within the Department of Homeland Security, for testing positive for a controlled substance in a

random drug test. We affirm.

BACKGROUND

Salas began working for the agency as a border patrol agent in January 2002. In May 2005 he became a canine handler. On August 1, 2006, Salas and other agents were notified that they had been selected for a random drug test. During his test, Salas handed his unsealed sample to the specimen collector, who walked out of the restroom with it. Salas then washed his hands, rejoined the specimen collector, and initialed a strip that the specimen collector then placed on the cap and body of a sample container. The agency sent the sample to an outside testing laboratory, which found that the sample tested positive for cocaine.

On September 7, 2006, the agency proposed to remove Salas from his position for his positive drug test. On October 19, 2006, Salas, through counsel, objected to the agency's proposed removal, inter alia, on the ground that Salas's sample had been collected improperly because the specimen collector had removed the sample from Salas's sight before sealing it. The agency removed Salas from his position on November 6, 2006.

Salas subsequently filed a grievance, and the arbitration hearing was held on June 20, 2007. Test results from a urine sample were introduced. Counsel for both parties described the test results as being from Salas's sample. At this hearing, the agency called one of Salas's supervisors as a witness, who testified that Salas participated in a random drug test on August 1, 2006. The agency

also called as a witness the medical review officer who had interpreted the report prepared by the outside laboratory that analyzed the sample. The medical review officer testified that the laboratory report showed that the sample tested positive for cocaine, and that another laboratory's analysis reconfirmed this positive test.

However, the agency did not present testimony regarding the chain of custody of Salas's sample. Salas testified that he lost sight of his unsealed sample when the specimen collector walked out of the restroom. On cross-examination, the medical review officer admitted that a sample should not leave the donor's sight until it is sealed. In his post-hearing brief, Salas asserted that his loss of sight of the sample raised questions about whether the sample was his. On August 8, 2007, the arbitrator denied Salas's grievance, finding Salas's testimony regarding his brief loss of sight of his sample to be "insufficient to justify disregarding the test results," and concluding that the agency proved by a preponderance of the evidence that Salas tested positive for cocaine in a random drug test.

Salas timely appealed to this court, and we have jurisdiction pursuant to 5 U.S.C. § 7121(f) and 5 U.S.C. § 7703(a)(1), (b)(1).

DISCUSSION

We review the arbitrator's decision under the same standards that apply to appeals from decisions of the Merit Systems Protection Board. See 5 U.S.C. § 7121(f); Dixon v. Dep't of Transp., 8 F.3d 798, 803 (Fed. Cir. 1993). We must affirm the arbitrator's decision unless it was "(1) arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. v. Nat'l Labor Relations Bd., 305 U.S. 197, 229 (1938).

Salas asserts that, because he briefly lost sight of his sample, the agency did not meet its burden of proving that the sample testing positive was his. The possibility that Salas's sample was misidentified or tampered with while he lost sight of it is speculative. Salas described his brief loss of sight of his sample but presented no other testimony or evidence at the hearing suggesting that the sample was not his.

On review, Salas asserts for the first time that the agency was required to present witnesses at his arbitration hearing to testify to his sample's chain of custody under Boykin v. U.S. Postal Service, 51 M.S.P.R. 56, 58 (M.S.P.B. 1991) (finding that an agency did not meet its burden of showing a drug test was valid when the testimony of its witnesses was insufficient to prove the chain of custody). We have held that a drug test sample's "chain of custody must be strong enough so that, on the record as a whole, the decision of the arbitrator can be found to be supported by substantial evidence." Frank v. Dep't of Transp., Fed. Aviation Admin., 35 F.3d 1554, 1557 (Fed. Cir. 1994) (citing Dixon, 8 F.3d at 804). Salas did not raise this issue at the hearing or in his post-hearing brief. Indeed,

at the hearing his counsel referred to the test results as being from Salas's sample. Because "we do not consider issues that were not raised in the proceedings below," Frank, 35 F.3d at 1559, Salas cannot for the first time on review challenge the agency's failure to present witness testimony to the proof the chain of custody.

For these reasons, we affirm.

COSTS

No costs.

AN

ARBITRATION BETWEEN

U.S. DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(The Agency)

And

AFGE NATIONAL BORDER PATROL COUNCIL
2554 (The Union)

REMOVAL OF VICTOR SALAS

For the Agency: Nancy Gudel, Esq., Agency Representative
For the Union: Michael Baranic, Esq., Gattey Baranic, LLP

BEFORE
HARRY N. MACLEAN
INDEPENDENT ARBITRATOR

I. INTRODUCTION

This case involves the removal of Victor Salas (Grievant), a border patrol agent, for failing a drug test administered on August 1, 2006. The hearing was held at the El Centro Border Patrol Station in Imperial, California, on June 20, 2007. Both sides were given the opportunity to present oral and documentary evidence, and all witnesses testified under oath as administered by the Arbitrator. A transcript of the hearing was made. Briefs were submitted on July 16, 2007.

The parties stipulated that the steps of the grievance procedure had been followed and that the matter was properly before the Arbitrator for a final and binding decision. The parties also stipulated to the following issue: Whether the termination of Agent Salas was for just and sufficient cause and only for reasons that would promote the efficiency of the Agency.

II. FACTS

Grievant was employed as a border patrol agent and canine handler at the Indio station, which is part of the El Centro Sector. On August 1, based on random selection, he was administered a drug test. On August 7, the Agency was notified that Grievant had failed the drug test for cocaine. On September 7, Acting Deputy Chief Patrol Agent Norma King issued a letter of proposed removal based on his failure of the drug test. On October 19, Grievant submitted an oral reply, in which he denied using cocaine and claimed that he was exposed to the drug during a drug seizure on July 25th. On November 6, Chief Patrol Agent Carl

McClafferty sent a decision letter to Grievant removing him from the federal service.

The Agency presented three witnesses. The first, Dr. Mark Anderson, is a medical doctor and a certified medical review officer. Pursuant to a contract with the Agency, Anderson or others in his office review drug tests submitted by the Agency. He has been performing this work for the Agency for the past twenty-one years. He was accepted without objection as an expert in the field of interpreting drug tests.

Anderson testified that in interpreting drug tests he adheres to the guidelines adopted by Health and Human Services. Anderson explained that there really are two steps in the drug testing; the first step, referred to as immunoassay, is a test that occasionally allows for some drugs to appear as others. The HHH guidelines provide that if the sample exceeds the screening cutoff level, which is 300 nanograms per milliliter (ng/ml), then it has to be confirmed by a gas chromatograph and mass spectrometry test, which is extremely specific in analyzing the presence of benzoylecgonine, a cocaine metabolite, and which has a cutoff point of 1 50ng/ml.

Anderson testified that he reviewed the results of Grievant's drug test, which indicated that he scored 310 ng/ml on both tests, meaning that he exceeded the first cutoff by 10 ng/ml and the second cutoff by 160 ng/ml. The sample was tested by a second lab, and again it tested positive. Anderson testified that he spoke with Grievant by phone concerning the test, and that Grievant's answers indicated that he did not

have a valid medical explanation for the positive test result. Anderson notified the Agency by letter that Grievant had testified positive for cocaine and that the test was subsequently confirmed by another lab.

Concerning Grievant's explanation that the test resulted from a drug seizure six or seven days earlier, Dr. Anderson testified that it would have been impossible for Grievant to test positive as on August 1 as result of this earlier exposure. Cocaine normally leaves the body in twenty-four to forty-eight hours. The half-life of benzoylecgonine varies between .7 hours and 1.25 hours, which means that every hour half of what remains of the metabolite is eliminated. By extrapolating backwards from the amount of the metabolite measured on August 1 to July 26, Grievant would had to have ingested at least five grams of cocaine that day, which for most people is a lethal dose.

Dr. Anderson testified that cocaine is not absorbed through the skin, and that while it can be absorbed through a wound it would not be possible to absorb enough through a small cut to produce the result that was measured here. Likewise, it would be virtually impossible for someone to test positive at 310 ng/ml from rubbing his hands on his pants, which had cocaine on them, and then rubbing his nose. In Anderson's expert opinion, exposure to cocaine on July 26 could not have resulted in a positive test on August 1.

Counsel for the Union referred Anderson to an article describing a study in which 223 personnel involved in a dog training program, including janitors, a secretary and technician, were exposed

to cocaine and later tested. One individual later tested positive at 460 ng/ml. In Anderson's view, the test was rather loosely structured, and he agreed with the authors that a follow-up study was needed.

Field Operation Supervisor Tami Herrera, normally Grievant's supervisor, served as Acting Special Operations Supervisor on August 1, 2006. Grievant's shift started at 4 pm, and at the shift muster she informed him and several other agents that they had been selected for random drug tests and that they were to report to a specific building across the street. Grievant's response was different from his normal manner and from the other agents she notified. To Herrera, Grievant seemed a little panicked. He said, "They want to see me?" Herrera recalled the "out of the ordinary" response when she later got the call that he had failed the drug test.

Carl L. McClafferty is the Chief Patrol Agent for El Centro Sector. As such, he is in charge of the overall operations and the day-to-day work of the agents in the sector. McClafferty has been with the Border Patrol for 31 years, and has served in various other high level supervisory positions, such as Deputy Chief in Del Rio and Chief Patrol Agent in Detroit.

McClafferty made the decision to remove Grievant from the service for testing positive for a controlled substance. He rejected Grievant's explanation that the test resulted from a load of cocaine he had seized the previous week. McClafferty testified that in his 31 years in the Border Patrol he has never seen anyone test

positive from simply being in contact with drugs, including himself. In his various positions, he would have been informed if someone had received a positive drug test from contact. McClafferty recalled a mission to Brazil with U.S. soldiers and DEA agents which involved handling raw cocaine and destroying labs. Everyone was randomly drug tested and no one tested positive.

McClafferty testified that he considered the "Douglas factors" (Douglas v. Veterans Administration, 5 M.S.P.B. 313 (1981)) in considering whether termination was the appropriate discipline. Grievant had a good work record, good performance, and was one of the top canine handlers at Indio Station. McClafferty had in fact previously nominated Grievant as agent of the quarter. McClafferty looked at his job performance appraisals, talked to the station to see what his performance was like, and found his record clean and his performance good. He was the top canine handler in terms of seizures.

McClafferty also considered the nature and seriousness of the offense. As a canine handler, Grievant worked alone and had a lot more freedom than other agents. In carrying out his duty of interdicting illegal drugs, he is armed and can become involved in dangerous situations with drug dealers. He has access to intelligence and databases that contain information that could be useful to drug dealers, and if he were using drugs he would be susceptible to blackmail. In fact, most of the hard drug cases come from canine handlers. Border patrol agents also testify in criminal trials, and if Grievant remained on duty after failing a drug test

he would be prevented from testifying in trials on cases he was involved in.

In summary, McClafferty didn't believe Grievant's explanation, and he felt that the mitigating factors did not outweigh the seriousness of the offense. He lost all confidence and trust in Grievant after he failed the drug test. In his view, the penalty of removal was consistent with the Agency's table of offenses. It is also consistent with his past experience. In the one other similar instance occurring during his tenure at El Centro, the agent resigned. In the other instances over his career involving failed drug tests, the agents either resigned or were removed.

McClafferty also testified that cocaine is usually packaged tightly by the drug dealers, who also usually wipe off any residue to avoid detection by dogs. He admitted that on occasion packages of cocaine might tear while being extracted from a vehicle.

The Union presented seven witnesses. Grievant testified that he has been with the Border Patrol since January 2002. He became a canine handler in 2005. He testified that he was always happy to be called in by the Patrol or other agencies on his time off, and that he loved his job. He believes he was one of the best canine handlers because of the number of seizures he made and the value of the drugs seized. He was used as a model for other agents because of his dedication and energy. In fact, he had been asked to train other agents. The Patrol was his life, and he has never as an agent, nor would he ever, take illegal drugs.

On the day in question, Grievant was scheduled to work from 2 pm to 10 pm. At around 3, he was called to assist a new canine handler, Ray Vega, who had pulled an SUV over at a checkpoint for suspicion of carrying drugs.

Grievant identified photos of the SUV in question, and he also identified photos of the interior of the car showing that the metal on the rear deck had been cut open and pried back. He initially tried cutting the sheet metal with a Sawzall, but it bounced off the metal. They eventually used a circular saw and cut into the compartment. Other photos show Grievant in the back of the car in sweat-stained clothes and wearing gloves.

Grievant testified that he and Vega were inside the car for approximately three hours. Because of the heat, they started the car and turned on the air conditioning. The two men eventually removed twenty packages from the compartment. Early in the process, Grievant cut the packages open and ran tests on small amounts of the product. Some packages tested positive for cocaine, others for methamphetamine. Grievant also identified photos of his water bottle, sunglasses and cell phone in the vehicle. He testified that he cut his hand during the process.

Grievant testified that at one point he brushed a small amount of cocaine off a desk and into a wastebasket inside the station. He had made an incision into a package, and the cocaine "flew out of the package and onto the desk." He described the amount as "not small, not significantly large." He finished his shift at 1 am, and reported for canine training at 8 am. During the course of this

shift, he probably handled objects containing drugs. Grievant also testified as to the particular type of trousers that he wears and that he could go "weeks at a time" without washing them.

Grievant testified that on August 1 Herrera called out names of the agents who needed to stay behind to be tested. He went to a room, signed a piece of paper, met with the collector, went to a restroom and produced a sample, turned it in, and went to work. When Anderson called some days later and told him he'd failed the test, Grievant initially thought it was a prank. When he realized it wasn't, he got dressed and went immediately to the station and spoke with the patrol agent in charge. He was in shock. He turned in his weapon, his shield, and his vehicle. His dog, Rita, was also taken from him.

Grievant testified that he had a drug test performed the next morning, which showed negative. He also prepared a memorandum explaining what had happened. He filled out a CA-1, claiming an injury from the exposure. Grievant also testified that after hearing Dr. Anderson testify at the hearing that kidney problems might affect the excretion of cocaine, he recalled a doctor's report that he had received after being examined for lower back problems. The report, which showed a small cyst on his kidney, was received into evidence. Grievant also identified a 159-page document containing notes and pictures from his various cases.

Mr. Charles Wilcox is a forensic toxicologist who has been interpreting drug screens for the past 27 years. He identified the relevant documents in

this case and concluded that the positive drug test could "be very likely from the drug search and the work he was doing with drugs prior to his test." He based his opinion on the fact that several articles he had read indicated that while cocaine normally metabolizes in three to five days, there were cases in which it stayed in the system for a week to ten days. He also testified that since cocaine is water soluble, it was possible that cocaine could have entered the water bottle, and if Grievant had ingested the water he would test positive under the HHS standards. Since cocaine can also be absorbed through the skin, it would have been possible for Grievant to absorb cocaine from handling his cell phone or sunglasses if they had been exposed to cocaine. He cited studies showing that people handling drugs in crime labs had tested as high as 1600 ng/ml, and others has tested at 70 ng/ml just from handling money from a cocaine drug bust. Another article indicated that individuals involved in the preparation of training aids for military working dogs tested 460 ng/ml.

When asked on cross-examination if someone could test positive from touching sunglasses and cell phones after six-and-a-half day, he testified that they could still test positive. However, for someone to test positive seven to ten days later there would have to have been a high level of exposure in the first place.

Raymond Vega, the patrol agent who worked with Grievant on the seizure, gave an account of the seizure similar to that of Grievant. Not too long after they started cutting into the metal, the two men saw bundles. However, it took several hours to

remove all of them. Vega testified that the debris from the saw "went everywhere." He testified that while it was possible to tear the packages while extracting them, he did not know if that happened in this instance. Vega testified that Grievant was a very good agent; he had high energy and could always be trusted. He was the top canine handler in terms of seizures. Vega also testified that Grievant was wearing frisking gloves during the extraction, and that at one point he cut the back of his hand around the wrist area. He referred to it as a "little abrasion." Vega also testified to several possible tears on the packages of drugs in the photos. After the packages are cut for testing, the cuts are taped up and the packages wiped clean.

Under questioning by the Arbitrator, Vega said he did not see any damage to any of the packages when they were being extracted. Neither did he see any spillage coming out of the packages.

Agent Joanne Federico testified that she was in the station when Grievant and Vega were recovering and testing the packages. She observed Grievant testing several packages of suspected drugs, which were on a table. Two packages were cut open, and at one point she noticed Grievant brush "a little bit of residue off the table."

Federico also testified that Grievant was a hard worker and was always willing to go above and beyond. She had never seen him do anything to compromise his career in law enforcement and could absolutely not believe that he would take any drugs.

Under questioning by the Arbitrator as to the amount of substance which Grievant had brushed off

the table in the station, Federico testified that it would be an equivalent to the amount left if one shook a saltshaker twice.

Several agents who had either been in school with Grievant or worked with him, or both, testified enthusiastically about Grievant's good character and excellent performance as a patrol agent. Agent Stephen Stypinswki testified that Grievant was "above reproach," and that he was basically an inspiration and role model for other agents in his approach to the job and the performance of his duties. His work ethic was "insane," meaning he was always willing to work. He would bet his life on Grievant's innocence.

Agent Daniel Parra worked with Grievant at the Indio station. He testified that Grievant was the type of agent he wanted to be: a hard worker who set the standard and was always willing to do what it took to get it done. When he arrived at Indio station, Grievant mentored him, taking him aside and showing him the little tricks and procedures in running the checkpoints.

In rebuttal, Dr. Anderson testified that the small growth indicated on the Grievant's medical report would not cause any abnormality in the drug test. He also testified that it was not his experience that cocaine could be absorbed through the skin. The skin is a good barrier for almost any toxic substance, and when he tried to use it to anesthetize lacerations in the emergency room, it was very ineffective. When asked about Wilcox's testimony that it was possible to get a positive drug test result from touching personal items such as cell phones or sunglasses, Anderson stated that while it

may be possible to get a positive result it would not be at 150 ng/ml, let alone 310. In his opinion, such residual exposure could not lead to a positive drug test. He added that for a person to test positive after six to ten days, he would have to be a very heavy user, meaning half a gram a day. On the average, cocaine leaves the system in 24 hours. Dr. Anderson has never encountered a situation where someone tested positive for drugs due to accidental exposure.

III. ANALYSIS AND CONCLUSION

Under 5 U.S.C. Sec. 7701(c)(1)(B), the agency has the burden of proving the charge by a preponderance of the evidence. The Agency must also prove the existence of a relationship between the proven misconduct and the efficiency of the service. Alexander v. U.S. Postal Service, 2005 MSPB Lexis 5917 (Sept. 20, 2005). Finally, the Agency must show that the penalty imposed is reasonable. Id. at 2.

The charge in this instance was testing positive for a controlled substance. Dr. Anderson's testimony that Grievant tested positive for cocaine on both tests was basically unchallenged. The Union's only objection to the test was that the Agency failed to establish a chain of custody of the sample. This challenge rested solely on Grievant's testimony that at one point the collector turned his back on Grievant so that Grievant lost sight of the sample container. This testimony alone, even if accepted, is insufficient to justify disregarding the test results. No case law was cited to the Arbitrator to the effect that a

single error, such as losing sight of the vial for a brief period of time, requires, or even allows, the test to be invalidated. Other corroborating circumstances, such as other vials in the vicinity at the time or testimony regarding the possibility of a mix-up in such a situation, would be necessary before the test could be invalidated on this ground alone.

Dr. Anderson testified that Grievant did not have an adequate medical explanation for the failed test. Anderson asked Grievant a series of questions about his use of over-the-counter and prescription drugs, and none of Grievant's answers provided an alternative explanation. Anderson also testified that the one centimeter renal cyst would be inconsequential and have no effect on renal function. (The Union challenged Anderson's testimony on this point, arguing that an MRI does not adequately reveal damage to the kidney. However, Anderson was simply responding to a question; if the Union sought to establish kidney damage as the cause of the failed test, it was its burden to do so. The report showing a small renal cyst was insufficient to establish this fact). More important to the Arbitrator, the test results showed that the amount of creatine in the urine sample was normal, indicating that Grievant had normal kidney function.

Once the Agency has established that Grievant failed the drug test and that there was no other likely medical explanation, it seems to the Arbitrator that the burden shifts to the Grievant to prove that he did not use drugs or at least to present an alternate explanation for why he tested

positive. Exec. Order No 12564, 59 Fed. Reg. 32889. The Agency cannot be required to prove when and where he took the took drugs or that taking them was knowing and intentional. Williams v. Roche, 468 F. Supp. 2d 836 (E.D. La 2007). Likewise, the Agency cannot be expected to disprove every possible exculpatory explanation for the failed test. An innocent explanation for the failed drug test, if there is one, must be established by the Grievant, not disproven by the Agency. To rule otherwise would be to place an impossible burden on the agency.

In fact, the Union produced a good deal of evidence to support an alternate theory of why Grievant tested positive on August 1, and this is what is referred to the "accidental (or incidental) exposure" theory, referring to the drug seizure some six-and-a-half days earlier. The accidental exposure theory or explanation relies on the proof of two elements: (1) That Grievant was exposed to cocaine on the night of July 25 and that the exposure resulted in cocaine being ingested into his system, and (2) That as a result of this exposure and ingestion Grievant tested positive almost seven days later.

The exposure element of the theory is based on the fact that Grievant and Vega were inside the van for two to three hours with closed windows while extracting drugs with a saw and crow bar. The theory holds that either some of the drug spilled from the corners of the packages or that it spilled when the packages were damaged during extraction. The smoke and dust from the operation of the saw then kicked up cocaine dust. Further,

the theory assumes that the cocaine dust in the air landed either on or in Grievant's water bottle, or both, and on his sunglasses and cell phone, and further that Grievant at some later time ingested the cocaine by drinking the water and/or touching his sunglasses cell phone and water bottle. The cocaine could also have entered his system through a cut on his hand suffered in the extraction. The cocaine swirling in the air could also have come down on his pants, which he often went for several weeks without washing. Finally, he was exposed to the cocaine when he bushed it off the table in the station while testing it. The fundamental difficulty with the first element of the theory is that there simply was insufficient credible evidence to establish that there was cocaine dust or residue in the van, particularly an amount sufficient to coat the items in question so that later touching them or drinking water from the bottle would result in the drugs entering the system. Grievant testified that there was leakage from some corners of the packages. There was no evidence to corroborate this testimony, no photos of the drug on the floor or of loose corners on the packages. Vega did not believe that any of the drug had spilled, and he testified flatly "no" when asked if he saw any spillage. (The Union argues that exhibit 38, a photo, showed a knicked bundle of cocaine in the van. Such knicked bundle was not apparent to the Arbitrator). Testimony indicated that cocaine packages are commonly wrapped tightly by the drug dealers and that any residue is wiped off to inhibit the work of the canines. If in fact the corners were loose and leaking due to poor wrapping, it is difficult to believe that Vega wouldn't have noticed it or that Grievant

wouldn't have pointed it out to him at the time. The other possibility is that the packages were damaged during the extraction, either by getting cut by the saw, ripped by a hook used to pull the packages out, or hanging up on a jagged piece of metal. There was no evidence, either photographic or testimonial, that this happened. If in fact the packages were sufficiently damaged to allow large amounts of cocaine to fall out and swirl in the air, this would almost surely have been witnessed by Vega. The torn or ripped packages would have to have been repaired and sealed, and this would likely have been noted in the testimony or in photos. The only possible tears noted in the photos taken of the packages stacked on a tab le in the station show damage to the packages of methamphetamine, not cocaine. The Agency also makes a good point that since there were twenty packages of methamphetamine and only five packages of cocaine, it would have been four times as likely that any spillage would be of meth, and yet Grievant did not test positive for meth.

The Union argues that the white substance visible in the photos of the inside of the car could have been cocaine. The difficulty here is that neither Grievant nor Vega testified that the white substance in the photos was cocaine, which surely they would both have done if in their mind there was any possibility that it was. The implication from the agents' testimony is that the white substance was something called bondo, a gluing agent which the smugglers had apparently used to re-seal the metal after it had been cut open.

The only testimony other than Grievant's

about the presence of cocaine during the incident was Federico's, who testified that she saw Grievant brush an amount of cocaine equal to what would result from two shakes of a salt shaker off the table in the station. Vega testified that the "small abrasion" was on Grievant's upper wrist, not a likely site to be invaded by cocaine being brushed off a table.

Simply put, there was insufficient credible evidence that cocaine either spilled from the packages in the compartment or was released as a result of damage to the packages during extraction. For the accidental exposure theory to be viable, there would have to have been a fairly substantial amount of the drug spilled, inasmuch as once airborne it supposedly coated the cell phone, sunglasses and pants and entered the water bottle and/or the cut in Grievant's skin in sufficient quantity to allow Grievant to test positive almost seven days later. Even Wilcox testified that there would have to have been "high exposure" to the drug on the 25th for Grievant to test positive almost seven days later. The evidence does not support such a finding. Even crediting Grievant's testimony that there was "leakage" from some loose corners, getting this small amount—which Vega did not even notice—from the floor onto the items or in the cut in sufficient quantities to show up on a drug test almost a week later requires a speculative leap that is not justified by the evidence.

The second element of the theory is that either: (1) Grievant ingested enough cocaine that day to test positive almost seven days later, or (2) Grievant continued to touch objects with cocaine

on them so that the residue stayed in his system. The first possibility was refuted by Dr. Anderson's testimony that cocaine normally clears the system in two to three days. As noted above, in order to testify positive for cocaine almost seven days later Grievant would had to have, in Anderson's opinion, ingested an almost lethal dose, a possibility clearly not supported by the evidence. Even Wilcox testified that a positive tests seven to ten days later was "possible but unlikely."

The Union relied on a study entitled Urine Analysis of Laboratory Personnel Preparing Cocaine Training Aids for a Military Working Dog program, 25 Journal of Analytical Toxicology, October 2001 (Gelhausen, Kelette and Given). In this study 233 urine samples were collected from chemists, document examiners, evidence custodians and a secretary involved in a military working dog program which involved preparation of illegal substances for use in training dogs. While many urine samples showed low levels of the cocaine metabolite, only one sample tested above 300 ng/ml, the level necessary for a positive result. The study did not state whether the person who tested positive was a chemist or custodian or secretary, and there was no obvious control against the possibility that the person might have used cocaine outside of the program. Additionally, there was no evidence that the samples were taken six to seven days after exposure.

As mentioned above, Wilcox relied on several other studies to support his testimony that Grievant could test positive six-and-a-half days after exposure from the seizure and from training

his dog. People in drug labs had tested positive—one as high as 1600 ng/ml—and others had tested at 70 ng/ml just from handling money from a cocaine bust. First, these studies were not produced for review and introduction into evidence. Second, there was no evidence that the urine samples were collected six to seven days after exposure to the cocaine, as happened in the instant case.

The residual exposure theory assumes, of course, that cocaine did in fact cover the cell phone, sunglasses and pants and that it remained there in a sufficient amount that Grievant could have transferred the drug from the items to his hands over all or part of the ensuring six-and-a-half days, thus bringing the exposure time closer to the time of the drug test. This theory does not hold up. First, as the Agency points out in its brief, the photo of the water bottle shows that it is capped, which fits with common sense; otherwise the bottle might spill in the extraction process. Second, it is not unreasonable to assume that Grievant would have been handling these items frequently that day and the next day and that any cocaine on them would have worn off fairly quickly. One would have to imagine an item thickly coated with cocaine in order for someone to pick it up four or five days later and transfer the substance onto their hands.

It is also difficult to accept the possibility that the drug could have remained exposed on Grievant's pants for any period of time, given his own testimony that "They (the pants) are only going to get incredibly dirty the next day with sweat, blood, saliva from your dog, hair." Also, the

fact that Grievant was involved in training his dog the morning after the seizure, and thus might have been exposed to cocaine, does not substantially reduce the time period from exposure to testing.

Finally, there is the question of how the drug would get from Grievant's hands into his system. Dr. Anderson testified that the drug does not enter through skin; although this was rebutted by Wilcox, Anderson's testimony that absorbing the drug through the skin in any appreciable amounts would be unlikely was convincing given his experience with the drug in emergency room situations. (The Union attacked Anderson's credibility, arguing that he is biased because he has an ongoing contract with the Agency. The mere evidence of a contract, in the Arbitrator's view, doesn't establish bias. The amount of money received by Anderson is no way dependent on the number of positives he reports. It makes no different to him or the Agency who and how many people test positive.) Other than the abrasion on his upper wrist, which would have been difficult for Grievant to rub against the various items for transfer, the only other route of transmission would have been for Grievant to somehow inhale the drug from his fingers, such as when he was brushing his nose or perhaps holding something close to examine it. Dr. Anderson testified that the amount of residue on the hands necessary to test positive through inhalation would have to be the equivalent of one milligram given intravenously.

For the above reasons, the Arbitrator finds that the "accidental exposure" theory was not established by credible evidence or reliable science.

It involves too much speculation and too many leaps of faith to conclude (1) That there was loose cocaine on the floor of the car and in the air that day, and that (2) The cocaine coated the various mentioned items sufficiently-or entered his body through an abrasion or from drinking the water—to provide a positive drug test six and a half days later.

The Arbitrator also gives weight to the testimony of McClafferty that never in his thirty years of experience had he encountered an instance of "accidental exposure" to cocaine resulting in a positive test. It seems to the Arbitrator that if such transference were possible it would have been encountered and confirmed among law enforcement agencies dealing regularly with drugs long before this instance. McClafferty's testimony about his and other agents' constant exposure to raw cocaine in the jungles of Brazil without any positive tests resulting was particularly persuasive.

In the Arbitrator's view, it is not a difficult matter for the Agency to prove the nexus between the positive drug test and the efficiency of the Border Patrol. One of the primary tasks of the Border Patrol is to prevent illegal drugs from entering the country. The Border Patrol is a law enforcement agency and its agents are armed. As a canine handler, one of Grievant's primary responsibilities was to interdict illegal drugs entering the country. Canine handlers work independently and are required to exercise independent judgment. It seems obvious that an armed law enforcement officer charged with interdicting drugs who is found to have used those

drugs is so severely compromised, and so severely compromises the mission of the agency, that removal is the only possible and reasonable penalty. Drug smuggling is a dangerous and treacherous business, and an agent who is using drugs is susceptible to coercion and blackmail by the smugglers. It doesn't take much imagination to see how he could put fellow agents, as well as himself, at substantial risk by divulging schedules and routes of the agents and other highly sensitive information to the smugglers. Regardless of the positive opinions of Grievant's fellow agents who testified at the hearing, officers in the fields would undoubtedly question whether Grievant would be reliable or provide back-up in dangerous situations. The morale of the sector would almost certainly be affected.

The same reasoning supports a finding that the penalty of removal is reasonable. McClafferty testified that he considered all of the Douglas factors and determined that removal was reasonable. McClafferty testified that as a result of Grievant's failing the drug test and his (McClafferty's) rejection of the "accidental exposure" explanation, he had lost confidence in Grievant. McClafferty could no longer trust Grievant in the honest performance of his duties, and if the Chief Patrol Agent cannot, with good reason, trust a Border Patrol Agent in the honest performance of his duties, then removal is the only appropriate remedy. McClafferty testified that he considered the mitigating factors, such as Grievant's lack of prior discipline and his outstanding work record, but that they did not outweigh the seriousness of the offense and his resulting lack of confidence. He also

considered the fact that an agent who had failed a drug test would not be used by the U.S. Attorney's office in a drug prosecution, since such failure would have to be reported to defense counsel and would undermine the agent's credibility. McClafferty also testified that the penalty of removal in these circumstances is consistent with the penalty imposed on other agents and with the suggested penalty in the Agency's suggested table of offenses. Removal is in fact suggested as the appropriate remedy for the use, sale or distribution of illegal drugs or controlled substances. (The fact that Grievant was removed for failing a drug test does not take it out of this category of offenses.) The evidence indicated that Grievant was aware of the possible penalty through the agency's standards of conduct and a memorandum issued to all border patrol employees that use of illegal drugs could lead to removal.

In summary, once the offense of failing a drug test has been established, as it has been here, there seems to be little choice other than removal. This is true in cases where the agent has a superior work record and is highly respected and admired by his fellow agents, as Grievant was, because otherwise the precedent of an agent being allowed one free bite of the apple of drug use would be set. Such a precedent would seriously compromise the mission of the Agency and would be intolerable. It is similar to a pilot flying an airplane while drunk; you simply can't say, well, we'll give you a second chance. The risk of irreparable harm is too great. A cop caught stealing can no longer be a cop. A border patrol agent caught doing drugs can no longer be a border patrol Agent. This consequence is logical and

appropriate and necessary.

The Arbitrator was impressed by Grievant's protestation of his innocence, as well as his superior work record and the testimony of his co-workers that he would never do drugs. However, such facts and statements do not outweigh the evidence that Grievant tested positive for drugs on August 1, and further that his explanation of an accidental exposure some six-and-a-half days earlier was neither viable nor credible. Based on the above, the Arbitrator finds that the removal of Grievant was for just cause and only for reasons that would promote the efficiency of the Agency.

IV. AWARD

The grievance is denied.

Signed this 8th day of August 2007.